Supreme Court, U.S.
FILED

10-306 AUG 25 2010

OFFICE OF THE CLERK

(1)

169

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

STEVEN ROBERTS, SHANE DEARDORF, MATTHEW T. SHUEY, MICHAEL S. LYONS, CLAIR MARTIN, TIMOTHY W. WHEALE AND GORDON J. BERLIN
Petitioners

VS.

JACK F. MENTZER, JOSEPH M. DITZLER, AND ELIZABETHTOWN BOROUGH
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Don A. Bailey
4311 N. 6th Street
Harrisburg, PA 17110
(717) 221-9500
Attorney for Petitioners

QUESTIONS PRESENTED

1. Do private and public employees have any privacy or property rights in their personnel files?

Suggested Answer Yes!

2. Does a non-party witness, subpoenaed to testify as a deposition witness by their superior, have any notification rights to the use of their personnel files at a deposition?

Suggested Answer Yes!

LIST OF PARTIES

All Parties have been listed in the caption hereto

CORPORATE DISCLOSURE

This document is not subject to any provisions of Supreme Court Rule 29.6.

TABLE OF CONTENTS

	Pages
Questions Presented	i
Lists of Parties	ii
Corporate Disclosure	ii
Table of Cited Authorities	iii
Table of Appendices	iv
Opinions Below	1a-26a
Statement of Jurisdiction	1
Constitutional Provisions Involved	1-2
Statement of the Case	2
Reasons for Granting the Writ	6
Conclusion	7

TABLE OF AUTHORITIES

Cases	Pages
Whalen v. Roe Whalen v. Roe, 429 U.S. 589, 599-600, and (1977)	7
Nat'l Archives & Records Admin v. Famish, 541 U.S. 157 (2003).....	7
Oliver v. U.S. 466 U.S. 170 (1984).....	7
United States vs. Westinghouse Electric Corp, 638 F.2d 570, (3d Cir 1980)	7
Hunter v. Securities Exchange Commission, 879 F. Supp 494, 497-499.....	7
Fraternal Order of Police, Lodge No 5 v. City of Philadelphia, 812 F.2d 105 (3d Cir 1987).....	6,7
Paul P. by Laura L. v. Verniero, *170 F.3d 396 (3d Cir 1999)*.....	7

TABLE OF APPENDICES

Pages

Appendix A – Opinion of the Third Circuit Court of Appeals dated May 27, 2010.....1a-15a

Appendix B – Memorandum of the Eastern District Court of Pennsylvania dated July 2, 2009.....16a-26a

CITATIONS OF REPORTS BELOW

The Opinion of the Third Circuit Court of Appeals was filed on May 27, 2010. (App A). The Memorandum and Order of the Honorable Juan R. Sanchez was filed on July 2, 2009 (App B).

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Third Circuit for which review is sought was filed on May 27, 2010. That decision contravenes Rule 10(a) and (c) of this Court.

CONSITITIONAL PROVISIONS INVOLVED

The 4th Amendment to the U.S. Constitution is implicated in this case. The Amendment states in pertinent part as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The 14th Amendment to the U.S. Constitution is implicated in this case. The Amendment states in pertinent part as follows:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This matter begins during the discovery phase of an underlying case, namely *Michael Lyons et al. vs. Jack Mentzer et al.*, Civil Action No. 08-94, 2008 WL 4444 272 (E. D. Pa. October 2, 2008). Lyons is a police officer employed by a respondent here, Elizabethtown Borough. In the prior action Lyons had sued his Police Chief, Jack F. Mentzer and his assistant Joseph M. Ditzler. Lyons also sued the Borough of Elizabethtown. That case was dismissed by the same Federal District Court that dismissed *Steven Roberts et al, vs. Jack Mentzer et al.*, Civil Action No. 08-4507, (E.D. Pa. September 16, 2008)

In the earlier case Lyons was the sole plaintiff. He alleged 1st Amendment violations. His case was dismissed on *Garcetti* grounds by Judge Sanchez. Judge Sanchez awarded defendants $12,000.00 in costs against Lyons. During that litigation the events that gave rise to *08-4507*, led to this appeal. Lyons provided his F. R. Civ. P. 26 disclosures. As part of those disclosures he dutifully named persons who he believed might possess relevant factual knowledge. He named Steven L.

Roberts, a retiree. Shane Deardorff, Mathew T. Shuey, Clair Martin, Timothy W. Wheale, and Gordon J. Berlin. All of the above named persons are Petitioners in this action, except Gordon J. Berlin. And each is a police officer employed by Elizabethtown Borough, except for Steven L. Roberts, who retired well before Lyons even filed the case in District Court. Lyons never informed any of the Petitioners/Respondents that he had made reference to them as people with possible factual knowledge of any events relevant to his allegations in the earlier case. He sought no statements from them, and he did not interview them.

During discovery the Petitioners were subpoenaed to testify (except Lyons who was a party) to testify. Their personnel files were not subpoenaed and they were not requested to bring any documents.

None of the Petitioners, all of whom, except Roberts, were employed by Elizabethtown, and supervised by Mentzer and Ditzler (who were subpoenaed by Respondents lawyers), were told why they were being Subpoenaed nor for what purposes.

At some unknown time prior to their depositions, defendants below, Respondents' here, Mentzer, Ditzler and the Borough, took the Petitioners personnel files and gave them to the defendants/respondents attorneys, Frank Lavery Esquire, James Young, Esquire, and Michael Miller Esquire. The Borough Manager also participated in the process of procuring and reviewing the appellants' personnel files without their knowledge.

Even Roberts, the retiree, had his files surreptitiously taken.

At no time was Mr. Lyons, or his attorney, like the witnesses (Petitioners) noticed as to any of the above. None of the Petitioners were warned or informed that the Respondents or their lawyers had reviewed or absconded with their personnel files, or that the respondents who were sued in their individual, not their official capacities, intended to use them for any purposes. During the depositions of the appellants, which were conducted by Respondents lawyers, the voluminous personnel files appeared in the possession of the Respondents lawyers.

The attorneys, Mr. Lavery and Mr. Young (Mr. Miller did not actually participate) questioned the Respondents in an exceptionally aggressive adversial manner. Many questions involved medical psychological and other highly personal and sensitive information. The attorneys' introduced countless documents to the appellants' depositions from their personnel files as exhibits.

Petitioner Lyon's counsel, Mr. Bailey (Mr. Bailey did not represent the other Petitioners at that time) objected strenuously to the procedure at hand for a number of reasons. Neither Mr. Lyons nor Mr. Bailey had any awareness, like the deponees, that their personnel records were going to be used in their depositions. Their was no opportunity to review questions or object appropriately. In this regard the Third Circuit Opinion misses the issues entirely.

If recollection serves, Mr. Bailey reminded opposing counsel that the Petitioners/Respondents

were sued in their individual capacities. There was no labor dispute on the table, and that not only Mr. Lyons, but the witnesses themselves had no notice or warning about what was transpiring. Mr. Bailey, the deponees, and Mr. Lyons were informed that the personnel files were brought to the deposition by Petitioners counsel to search for "bias". They would not allow an opportunity to even stop and examine the documents. None of the Petitioners had any opportunity to contest or question the use of their personal files, or to question, quash or limit the use of their personal information against them on relevancy, privacy, or any other grounds. None were represented by counsel and although they were subpoenaed for purposes of testimony, their records and files were not. Even Roberts, the long time retiree, was treated in this fashion.

On July 2, 2009 the District Court held that the appellants had no property, private, or any other interest in their personal personnel records. The District Court held that the personnel files were owned and maintained by the employer. The District Court also held that because the depositions were not a public event the appellants had no privacy expectation in their files. The District Courts holding renders any constitutional or confidential rights employees or witnesses, or litigants might, or could have, in their personnel records meaningless and ineffectual.

REASONS FOR GRANTING THE WRIT

The Third Circuit opinion not only does not raise issues addressed and decided by the trial court below it, but it is noticeably lacking in legal support. Its treatment of the concept of "confidentiality" addressed in thousands of federal cases, is to avoid approaching the term. The opinion under review treatment of "expectations of privacy" is to dismiss it out of hand by referring to the amended complaint as indicating that the respondents "maintained and had access to the files". This is not relevant. As to "property" the Third Circuit Opinion says the Petitioners complaint did not assert any property interest. See App A pgs 1a-15a. This is totally and completely misapprehended by the Third Circuit. The following quote is taken directly from page 2 of the Amendment Complaint.

"The records are also property, and for 14th Amendment purposes, they allege a protected property interest in their records both personnel and medical. The plaintiff alleges that the records are their property (some copies of which were taken without their permission and used in litigation against them) in which they maintain precise and in achievable rights as a matter of Pennsylvania law. Also Michael Lyons asserts a First Amendment claim alleging that the defendants acted in retaliation for the previous lawsuit he filed". Paragraphs 8 and 9 under the topic. "Rights Violated" expressly identifies these rights in the complaint.

Merely a cursory review of the appealed from opinion reveals a dearth of legal support. The District Court did the same in their brief below. The Petitioners cited to Supreme Court cases on point. *See Whalen v. Roe Whalen v. Roe*, 429 U.S. 589, 599-600, and (1977). See also Id at 497; *Nat'l Archives & Records Admin v. Famish*, 541 U.S. 157 (2003); *Oliver v. U.S.* 466 U.S. 170 (1984). Petitioners also cited to a number of Third Circuit cases that recognized a matrix of rights held by persons in there personnel files. *United States vs. Westinghouse Electric Corp*, 638 F.2d 570, (3d Cir 1980); *Hunter v. Securities Exchange Commission*, 879 F. Supp 494, 497-499; *Fraternal Order of Police, Lodge No 5 v. City of Philadelphia*, 812 F.2d 105 (3d Cir 1987), and see *Paul P. by Laura L. v. Verniero, 170 F.3d 396 (3d Cir 1999)*.

The Third Circuit not only avoided supporting its own position in the Opinion below but it expressly departed from the holdings of this Court.

CONCLUSION

The Third Circuit has not only deported from its own law but held, in novel fashion, that the law of this Court has expressly held that an employer not only owns an employee's personnel file but that the employee has no confidentiality, privacy, or property rights in the file when third persons take the file for their own use. This Court should accept the Writ and clarify these issues.

Appendix A – Opinion of the Third Circuit Court of Appeals dated May 27, 2010.

NOT PRECEDENTIAL

UNITED STATES
COURT OF APPEALS
FOR THE THIRD
CIRCUIT

No. 09-3251

STEVEN L. ROBERTS; SHANE DEARDORFF;
MATTHEW T. SHUEY; MICHAEL S. LYONS;
CLAIR MARTIN; TIMOTHY W. WHEALE;
GORDON J. BERLIN
JACK F. MENTZER, JOSEPH M. DITZLER
ELIZABETHTOWN BOROUGH

Steven L. Roberts, Shane Deardorff, Matthew T. Shuey, Michael S. Lyons, Clair Martin and Timothy W. Wheale.

Appellants

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 08-CV-4507)
District Judge: Honorable Juan R. Sanchez

Submitted Under Third Circuit LAR 34.1(a)

Before: SCIRICA and AMBRO, Circuit Judges, and JONES,* District Judge

(Opinion filed: May 27, 2010)

OPINION

JONES, District Judge

Steven L. Roberts ("Roberts"), Shane Deardorff ("Deardorff"), Matthew T. Shuey ("Shuey"), Michael S. Lyons ("Lyons"), Clair Martin ("Martin"), and Timothy W. Wheale ("Wheale") appeal the District Court's dismissal of their 42 U.S.C. § 1983 claims, which are based on alleged violations of the rights secured under the First, Fourth, and Fourteenth Amendments of the federal Constitution and the related rights protected under the Pennsylvania Constitution. We affirm.

I.

In 2008, Michael Lyons ("Lyons"), a police officer with the Borough of Elizabethtown (the "Borough"), sued the Borough, Police Chief Jack F. Mentzer ("Chief Mentzer"), and Assistant Chief Joseph M. Ditzler ("Assistant Chief Ditzler"), (collectively, "the Defendants" or "Appellants"), alleging that they retaliated against him [1]in violation of his First Amendment rights. While that case was ultimately resolved on summary judgment, the facts under girding the present case occurred during the *Lyons I* discovery period. In his initial disclosures made pursuant to Federal Rule of Civil Procedure 26(a), Lyons listed Roberts, Deardorff, Shuey, Martin, Wheale, and Gordon J. Berlin ("Berlin") as individuals who might have information

relevant to his First Amendment claim. Consequently, the Defendants sought to depose [2] these individuals. Prior to the depositions, the Defendants allegedly provided their attorneys with the personnel files of the Police Officers without the Police Officers' consent. During their respective depositions, the Police Officers were allegedly questioned about sensitive and confidential information contained in their personnel files. The instant matter was subsequently initiated by Lyons, Roberts, Deardorff, Shucy, Martin, and Wheale.

II.

Our review of the District Court's order granting Defendants'/Appellees' Motion to Dismiss the Amended Complaint is plenary. *See AT&T* v.

---

[1] This provision states, in relevant part, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured ... ."42 U.S.C. § 1983.

[2] The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(a)(3)-(4), 1367. We have jurisdiction under 28 U.S.C. § 1291.

JMT Telecom, LLC, 470, F.3d 525, 530 (3d Cir. 2006). In conducting a plenary review of this case, we must accept as true all of the allegations contained in the amended complaint and draw all inferences from the allegations in the light most favorable to the Plaintiffs/Appellants. *See Phillips* v. *County of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008) (quoting *Pinker* v. *Roche Holdings, Ltd.*, 292 F.3d 361, 374 n.7 (3d Cir. 2002)). A motion to dismiss should be granted if the Plaintiffs are unable to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. V. Twombly*, 550 U.S. 544, 570 (2007). The plausibility standard requires "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft* v. *Iqbal*, - - U.S. - -, 129 S.Ct. 1937, 1949 (2009). Rather, the "[factual allegations must be enough to raise a right to relief above the speculative level. . . ." *Twombly*, 550 U.S. at 555.

III.

Appellants argue that the District Court erred in granting summary judgment on their federal and state constitutional claims. We address these claims *seriatim*.

A. First Amendment Claims

Appellants allege that their First Amendment rights to appear as witnesses, to associate with persons of their choosing, to access the courts, to petition the courts for redress, and to be free from retaliation were denied by Appellees' actions in the underlying litigation. We discuss these in turn.

Appellants' right to access claim appears to be predicated upon the assertion that the use of their

personnel files during the depositions conducted in *Lyons I* somehow compromised the success of that suit. In order to maintain such a suit, Appellants must "demonstrate that a defendant caused 'actual [3]injury' . . . *i.e.*, took or was responsible for actions that 'hindered [a plaintiffs] efforts to pursue a legal claim.'"

Beckerman v. *Susquehanna Twp. Police & Admin.*, 254 Fed. Appx. 149, 153 (3d Cir. 2007) (citing *Monsky* v. *Moraghan*, 127 F.3d 243, 247 (2d Cir. 1997) (citations omitted)). Since the underlying litigation was instituted by Lyons alone, he is the only individual who could possibly maintain a First Amendment right to access claim. However, his right to access claim fails because the First

---

[3] We shall refer to this initial suit as "*Lyons I*."

[4] District Judge Juan R. Sanchez granted summary judgment in favor of Chief Mentzer, Assistant Chief Ditzler, and the Borough, reasoning that Lyons' First Amendment claim was barred because his speech occurred pursuant to his official duties and was therefore not protected. *See Lyons* v. *Mentzer*, 2008 WL 4444272 *4 (E.D. Pa. 2008) *(Lyons I)* (citing *Garcetti v. Ceballos*, 547 U.S. 410, 410-11 (2006)).

[5] Rule 26 requires a party to provide its opponent with, *inter alia*, "the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment." Fed. R. Civ. P. 26(a)(1)(A)(i).

[6] These individuals were either current or former police officers of the Elizabethtown Borough at the time Lyons joined the police force. We shall refer to them collectively as "the Police Officers."

Amendment claim he asserted in *Lyons I* was dismissed for reasons unrelated to the testimony given by the Police Officers, meaning that the Appellees' conduct did not in fact cause him any harm. Accordingly, the District Court appropriately dismissed the First Amendment right to access claims.

[4]In relation to the right to petition claims, we note again that Lyons is the only individual who could possibly maintain such a claim since he is the only individual who petitioned the government prior to this suit. However, his right to petition claim seems to be based on the same premise as his right

---

[4] 8The federal Constitution provides the minimum safeguards for individual liberty. *See Florida v. Powell*, 130 S.Ct. 1195, 1203 (3d Cir. 2010) ("state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution"). Therefore, conduct that does not violate the federal Constitution cannot violate the Pennsylvania state Constitution. As we explain below, we do not believe that the conduct of the Appellees violated the federal Constitution, and so our analysis is confined to federal constitutional principles.

[9] In doing so, we take special care not to conflate the conduct of Appellees (providing their attorneys with the personnel files) with the conduct of Appellees' attorneys (using information in the files as the basis for allegedly improper questions).

to access claim; to wit, that Appellees' conduct compromised the testimony he would have elicited from the Police Officers, thereby preventing him from maintaining his First Amendment retaliation claim in *Lyons I*. Since we view these claims as indistinguishable, *see Woodford* v. *Ngo*, 548 U.S. 81, 122 (2006) ("the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances"), we shall deny Lyons' right to petition claim for the reasons stated in our discussion of his right to access claim. Accordingly, the District Court did not err in dismissing Appellants' right to petition claims.

With regard to Appellants' right of association claim, we note that "the First Amendment protects two types of association: expressive and intimate. Generally speaking, expressive association protects the ability of individuals to gather in order to pursue political, social, economic, educational, religious, and cultural ends .... Intimate association protects the closest and most interdependent of human relationships against state interference." *Schultz* v. *Wilson*, 304 Fed. Appx. 116, 120 (3d Cir. 2008) (internal quotations and citations omitted). Since Appellants allege that Appellees' conduct prevented them from freely associating with individuals of their choosing, we construe their claims as being grounded in the theory of intimate association. Intimate associations "by their nature involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's

life." *Pi Lambda Phi Fraternity, Inc.* v. *University of Pittsburgh*, 229 F.3d 435, 442 (3d Cir. 2000) (quoting *Roberts* v. *United States Jaycees*, 468 U.S. 609, 619-20 (1984)). Appellants have not provided us with any authority, nor can we locate the same, indicating that any type of employment, much less the public employment at issue in this case, automatically gives rise to an "intimate association." Further, [5]Appellants have failed to lodge allegations from which a reasonable person could infer that such an association developed amongst them. Moreover, Appellants have failed to identify how Appellees' disclosure of the personnel files adversely affected their rights of association. Accordingly, the District Court properly dismissed Appellants' freedom of

---

[10] Indeed, as noted, *Lyons I* was dismissed because Lyons could not establish that his speech was uttered as a citizen, and not in his official capacity. *See Lyons I* at * 3 (Lyons' speech included, *inter alia*, "his complaints to superiors, up the chain of command, regarding fellow officers failing to follow up on criminal investigations, unreasonably returning police reports for punctuation errors, interfering with Drug Task Force investigations, improperly issuing violation notices for work properly performed, unlawfully seizing drugs from other jurisdictions, and inappropriately discussing confidential police information with civilians."). Assuming, *arguendo*, that Appellees' conduct did deprive Lyons of certain testimony, that testimony could not have possibly altered the very nature of Lyons' speech. Consequently, we do not believe that Appellees' conduct caused Lyons actual injury.

association claims for failure to state a claim upon which relief may be granted.

Appellants also argue that Appellees' conduct infringed upon their First Amendment rights to appear as witnesses. However, although the right to appear and give true testimony as a witness in a legal proceeding is guaranteed by the free speech clause of the First Amendment, *see Melton* v. *Oklahoma City*, 879 F.2d 706, 714 (10th Cir. 1989), *cert, denied*, 502 U.S. 906 (1991), Appellants have not alleged that Appellees' conduct caused them either to fail to appear as witnesses or to provide false testimony when they did appear as witnesses. Indeed, as the District Court noted, Appellants do not contest the fact that during the litigation of this case they did have an opportunity to appear as witnesses and be deposed with their attorneys present. If the Appellants felt that improprieties were committed in connection with their depositions they could have alerted the District Court to the same. *See* Fed. R. Civ. P. 30." However, they failed to do so. Accordingly, the District Court properly dismissed Appellants' First Amendment claims to this extent.

Finally, to the extent that Appellants have lodged First Amendment retaliation claims against the Appellees, we take cognizance of the three-step burden-shifting analysis utilized when analyzing claims of this nature by public employees. *See Hill* v. *City of Scranton*, 411 F.3d 118, 125 (3d Cir. 2005). "First, the employee must show that the activity is in fact protected. Second, the employee must show that the protected activity 'was a substantial factor

in the alleged retaliatory action.' Third, the employer may defeat the employee's claim by demonstrating that the same adverse action would have taken place in the absence of the protected conduct." *Id.* (citations omitted). In determining whether an alleged act of retaliation can sufficiently support a First Amendment retaliation claim, we look to whether the act would be "sufficient to deter a person of ordinary firmness from exercising his First Amendment rights." *McKee* v. *Hart,* 436 F.3d [6]165, 170 (3d Cir. 2006) (internal quotation marks and citation omitted). In the case at bar, as far as we can tell, the First Amendment retaliation claim asserted by Lyons is premised upon his filing of *Lyons I,* and the retaliation claims asserted by the

As the District Court noted, "Depositions are adversarial in nature . . . ." *Jiminez* v. *Ail-American Rathskeller, Inc.,* 503 F.3d 247, 253 (3d Cir. 2007) (citing *Darnell v. Target Stores,* 16 F.3d 174, 176 (7th Cir. 1994)). Nothing in the amended complaint indicates that Appellees' disclosure of the personnel files was done for any purpose other than to assist in their defense of Lyons' allegations. Indeed, Appellants admit that the personnel files were being

---

[1] When a deposition is "being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party," the deponent or party may move the court to terminate or limit the scope of the deposition. *See* Fed. R. Civ. P. 30(d)(3)(A).

used in order to identify bias and to otherwise impeach their credibility or cast them in a negative light. *See* Amend. Comply 19. Certainly, such a use was reasonable given the nature of the lawsuit in *Lyons I*, *i.e.* a First Amendment retaliation suit. Consequently, we believe that the conduct about which Appellants complain is not "sufficient to deter a person of ordinary firmness from exercising his First Amendment rights."[12] Accordingly, the District Court did not err in dismissing Appellants' First Amendment retaliation claims.

B. Fourth Amendment Claims

The Fourth Amendment states, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST, amend IV. An individual's Fourth Amendment rights are implicated in situations where he or she has a reasonable expectation of privacy. *See O'Connor* v. *Ortega*, 480 U.S. 709, 715 (1987). The amended complaint clearly avers that the Appellees maintained and had access to the personnel files. *See* Amended Compl. ¶'s 15,16. Conversely, the amended complaint is completely bereft of any indication that the personnel files belonged to Appellants. Nor have Appellants provided us with any case law indicating that employees have a privacy interest in the personnel files maintained by their employers.

Indeed, we believe that reasonable employees would assume that the personnel files maintained by their employer could be used in an employment-discrimination lawsuit in which they testified. In such circumstances, we believe that there is no reasonable expectation of privacy in said files. *See Ortega*, 480 U.S. at 717 ("The employee's expectation of privacy must be assessed in the context of the employment relation."). Therefore, we find that the District Court did not err in dismissing Appellants' [7]Fourth Amendment claims.

C. Fourteenth Amendment Substantive Due Process Claims

The due process clause of the Fourteenth Amendment states, in pertinent part, "No State shall... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S.CONST, amend. XIV. The elements of a substantive due process claim are that: (i) defendants acted under color of law; (ii) a protected property or liberty interest was at stake; (iii) the defendants had a duty of care toward the plaintiff; and (iv) a deprivation within the meaning of the due process clause occurred. *See Fagan* v. *City of*

---

[12] This conclusion is buttressed by the fact that although Appellants had the opportunity to complain about the alleged improprieties associated with the depositions, they failed to do so. Quite simply, we decline the invitation to classify zealous cross-examination as retaliatory conduct.

Vineland, 22 F.3d 1296, 1310 (3d Cir. 1994). The amended complaint avers that Appellees, in their official capacities, violated Appellants' substantive due process rights by depriving them of their protected property interests in their personnel and medical records and their protected liberty interest in being "free of arbitrary and capricious government actions devoid of any legitimate government purposes . . .." Amend Compl. ¶'s 8, 22.

In order to support a substantive due process claim, the government conduct must be "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Kaucher* v. *County of Bucks*, 455 F.3d 418, 425 (3d Cir. 2006). The determination of whether conduct "shocks the conscience" is dependent upon the facts of each particular case. *See id.* at 425-26. As aforestated, we believe that, in the context of *Lyons I*, it was entirely reasonable for Appellees to do provide their counsel with the personnel files of those individuals who were specifically identified by Lyons in Rule 26(a) disclosures and who have been subpoenaed to testify, as doing so would assist their counsel in determining whether Lyons' allegations of unlawful retaliation were meritorious. Accordingly, we do not believe that Appellees' conduct "shocks the conscience," meaning that the District Court did not err in concluding that Appellants failed to state a substantive due process claim upon which relief can be granted.

Based on the foregoing discussion, the District Court properly dismissed the above-captioned action because Appellants failed to establish that their First, Fourth, or Fourteenth Amendment rights had

been violated. However, even if Appellants' rights had been violated, the doctrine of qualified immunity would insulate Mentzer and Ditzler from liability. The doctrine of qualified immunity protects government officials performing discretionary functions so long as their conduct does not violate established constitutional rights of which a reasonable person would have known. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). Stated differently, in assessing whether Chief Mentzer and Assistant Chief Ditzler should be vested with qualified immunity, we must determine whether there was a constitutional violation and whether there was good reason for them to know that their actions were unconstitutional. *Wilkie* v. *Robbins*, 551 U.S. 537 (2007) (citing *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001)); *see also Pearson* v. *Callahan*, -- U.S. - -, 129 S.Ct. 808 (2009) (modifying *Saucier* to the extent that courts need not address one specific inquiry before the other). As stated above, given that Appellees' conduct occurred in the context of a First Amendment retaliation lawsuit in which Appellants were identified in Rule 26(a) disclosures and subpoenaed to testify, we do not believe that a reasonable person could conclude that Appellees should have known that their disclosure of Appellants' personnel files violated either the First, Fourth, or Fourteenth Amendments of the federal Constitution.[15] Consequently, Appellees would be vested with qualified immunity in the instant lawsuit. *See Groh* v. *Ramirez*, 540 U.S. 551, 571 (2004) (for the proposition that qualified immunity provides ample protection to all but the plainly

incompetent or those who knowingly violate the law). Accordingly, the District Court's decision to dismiss the claims against them was proper in any event.

Further, with regard to the allegations lodged against the Borough, we note that a municipality is liable under § 1983 for constitutional violations "when the execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflict the injury." *Monell* v. *Dep't of Soc. Serv.*, 436 U.S. 658, 694 (1978). A municipality is not liable under § 1983 unless the policy or custom is the moving force behind the constitutional violation. *City of Canton* v. *Harris*, 489 U.S. 378, 388 (1989). The amended complaint is completely bereft of any allegations related to a policy or custom adopted by the Borough, much less a policy or custom that directly resulted in the alleged deprivation of Appellants' constitutional rights. Accordingly, the District Court's decision to dismiss the claims against it was entirely appropriate.

Based on the foregoing, we affirm the judgment of the District Court.

Appendix B – Memorandum of the Eastern District Court of Pennsylvania dated July 2, 2009

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STEVEN L. ROBERTS, et al. CIVIL ACTION

v.[8]

No.: 08-4507

JACK F. MENTZER. et al.

MEMORANDUM AND ORDER

Juan R. Sanchez, J.

In this civil rights action/ Plaintiffs Michael S. Lyons, Steven L. Roberts, Shane Deardorff, Matthew T. Shuey, Clair Martin, Timothy W. Wheale, and Gordon J. Berlin maintain they possess privacy and property rights in their personnel files, and allege their First, Fourth, and Fourteenth Amendment rights were violated when, without any advance notice to Plaintiffs, Defendants used information from the personnel files against Plaintiffs when deposing them during discovery in *Lyons v. Metzer,* Civil Action No. 08-94, 2008 WL4444272 (ED. Pa. Oct 2, 2008). Defendants Jack F. Mentzer, Joseph M. Ditzler,

[8] Plaintiffs bring this action under 42 U.S.C. §1983.

and Elizabethtown Borough move to dismiss Plaintiffs' Amended Complaint for failure to state a claim, and request sanctions be imposed against Plaintiff Michael S. Lyons. Because this Court concludes Plaintiffs fail to state a claim entitling them- to relief, the claims will be dismissed. Sanctions, however, will not be imposed against Lyons.

FACTS

This action arises from the *Lyons* action, in which Plaintiff Michael S. Lyons, an Elizabethtown Borough police officer, brought a §1983 suit against the same Defendants in this action alleging retaliation for his exercise of First Amendment rights. Lyons claimed he suffered retaliation in the retaliation in the form of disparate treatment such as improperly applied excessively severe and unique punishment different from how other officers similarly situated were treated, ostracism, less desirable duty assignments, consistent harassment, and the intentional denigration of his professional standing.'" Document 1, *Lyons* v. *Marnier,* Civil Action No. 08-94. In that action, this Court granted summary judgment because Lyons' statements were made pursuant to his official duties, and thus were not First Amendment protected speech.

The Plaintiffs in this action are police officers employed by Defendant Elizabethtown Borough, and are subordinates of Defendants Jack. F. Mentzer and Joseph M. Ditzler. Roberts, Deardorff, Shuey, Martin and Wheale, and Berlin were all identified in Lyons's pretrial disclosures in the prior action as individuals with discoverable information. Each Plaintiff was

deposed, with counsel from both sides present, in the *Lyons* action.

During the depositions, Defendants used information from Plaintiffs' personnel flies, accessed without Plaintiffs' permission or knowledge, to "question and impeach [Plaintiffs] or otherwise cast them in a negative light as part of a defense stratagem to destroy their credibility as witnesses and to intimidate them." Am. Compl. 5-6. Plaintiffs allege they each have a privacy right and a property interest in their individual personnel records, and "a right to be free of intentional efforts to intimidate them and cause them emotional injury." Am. Compl. 4. As a result. Plaintiffs maintain, their rights under the First, Fourth, and. Fourteenth Amendments were violated, when Defendants access their personnel files and used information from such files at deposition.

DISCUSSION

A motion to dismiss under Federal Rule of Civil Procedure 12(b) (6) admits, for the purposes of the motion, the complaint's well-pleaded allegations, but denies their legal sufficiency. *Hosp. Bldg. Co. v. Trustees of (he Rex Hasp.*, 425 U.S. 738, 740 (1976): *T.R. Ashe, Inc. v. Bolus,* 34 F. Supp. 2d 272. 274-75 (M.D. Pa. 1999). The Court must accept the complaint's factual allegations as true, as well as all reasonable inferences which may be drawn from the allegations. *Nami v. Fauver,* 82 P.3d 63, 65 *(26* Cir. 1996). "But a court need not credit a complaint's 'ba.ld assertions' or 'legal conclusions' when deciding a motion to dismiss/' *Morse v. Lower Met ion School Dist.*, 132 F.3d 902,906 (3d Cir. 1997) (quoting *In re Burlington Coat Factory Sec. Litig* 114 F.3d 1410,

1429-30 (3d Cir. 1997)). "[Conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Fernandez-Monies* v. *Allied Pilots Ass'n*, 987 F.2d 278, 287 (5th Cir. 1993), "Factual allegations must be enough to raise a right to relief above the speculative level.[1]" *Bell Atlantic Corp.* v. *Twombly* \ 550 U.S. 544, 555 (2007).

"In 42 U.S.C. §1983, Congress has created a federal cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.'" *Town of Castle Rock, Colo.* v. *Gonzales,* 545 U.S. 748, 755 (2005) (quoting 42 U.S.C. §1983). State officials acting in their official capacities can be sued in their individual, personal capacities provided plaintiffs demonstrate they acted under color of state law and deprived plaintiffs of a federal right. *Groman v. Twp of Manalapan*, 47 F.3d 628, 633 (3d Cir. 1995).

Plaintiffs allege their First Amendment rights to appear as witnesses, to associate with persons of their choosing, to access and use the courts free of unlawful intimidation and state interference, and to petition for a redress of grievances were denied in the *Lyons* matter. Specifically, "matters from [Plaintiffs'] personnel files were used to question and impeach them or otherwise cast them in a negative light as part of a defense strategy to destroy their credibility as witnesses and to intimidate them." Am. Compl. 6. in addition, "medical information which was private and protected, in [Plaintiffs'] view, was used from time to time as the basis of questions in efforts lo

cast them in a negative light or intimidate them." Am. Compl. 6. Nothing is alleged, however, that suggests Plaintiffs were questioned during depositions by Defense counsel in anything other man an adversarial manner. "Depositions are adversarial in nature and provide the opportunity for direct and cross-examination." *Darnell v. Target Stores,* 16 F.3d 174, 176 (7th Cir. 1.994). Vigorous cross examination, for evidence of bias or to attack a witness's credibility does not amount to retaliation. Indeed, that is the purpose of cross examination. In addition, none of the Plaintiffs were prevented from appearing as witnesses and fully testifying as to their knowledge of the claims after Lyons disclosed his association with the other Plaintiffs when he identified them in his Initial Disclosure and in his Answers to interrogatories as individuals having knowledge of the claims in the *Lyons* matter. Plaintiffs do not dispute each had the opportunity to appear as a witness and be deposed with attorneys from both sides present/' Plaintiffs fail to show they suffered retaliation or were prevented from freely appearing as witnesses, associating with persons of their choosing, or accessing and using the courts.

Next, Plaintiffs' Fourth and Fourteenth Amendment claims fail because Plaintiffs cannot show they had a reasonable expectation of privacy or a property interest in their personnel files. "The Fourth Amendment protects the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *O 'Connor v. Ortega,* 480 U.S. 709,

"[9] 715 (1987) (citation and internal quotation marks omitted). "Searches and seizures by government employers or supervisors of the private property of their employees ... are subject to the restraints of the Fourth Amendment." *hi* A plaintiffs Fourth Amendment rights are implicated only if the conduct of the defendant infringed upon a reasonable expectation of privacy. *Id.* In determining what privacy expectations are reasonable, "The Court has given weight to such factors as the intention of the Framcrs of the Fourth Amendment, the uses to which the individual has put a location, and our societal understanding that certain areas deserve the most scrupulous protection from government invasion/' *Id.* (citing *Oliver* v. *United States,* 466 U.S. 170, 178 (1984)). 'The operational realities of the workplace, however, may make some employees' expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement official. Public employees' expectations of privacy *in* their offices, desks, and file cabinets ... may be reduced by virtue of actual office practices and procedures, or by legitimate regulation." *Id.* at 717. "The employee's expectation of privacy must be

---

[9] Plaintiffs also never complained of Defense misconduct during depositions in the prior action. When a deposition is "being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party," the deponent or a party may move the court where the action is pending or the deposition is being taken to terminate or limit the deposition. Fed. R. Civ. P. 30(d)(3)(A). Plaintiffs never filed such a motion or otherwise informed the Court that deponents were being intimidated by Defendants.

assessed in the context of the employment relation." *Id.*

Defendants owned and maintained the employees' personnel files. Any expectation of privacy in personnel files is unreasonable when the employer or supervisor who owns and maintains them has free access to them. Because Plaintiffs had no reasonable expectation of privacy in their personnel files, their Fourth Amendment rights are not implicated.

Additionally, to the extent Plaintiffs argue Defendants violated any expectation of privacy by publicly disclosing the contents of the personnel files during deposition, this claim also fails because pretrial depositions are not public events. *See, e.g., Seattle Times Co.* v. *Rhinehart 467* U.S. 20, 33 (1984) (citation omitted) ("[P] retrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law, and, in general, they are conducted in private as a matter of modern practice.").

Plaintiffs claim their Fourteenth Amendment rights are implicated because they possess property interests in their personnel files, and Defendants deprived them of this property interest without due process when the files were accessed and used against Plaintiffs without notice to them. The Fourteenth Amendment provides that a State shall not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1. Plaintiffs had notice these files could be used in discovery when they were called to testify regarding Lyons's employment-There also is no

authority to support Plaintiffs' contention they had a properly interest in their personnel files. Further, nothing supports Plaintiffs' position a property interest, if any, was deprived when Defendants used, for the purposes of discovery, files which Plaintiffs themselves had placed at issue.

In any event, the claims against Mentzer and Ditzler must be dismissed, because they are-entitled to qualified immunity. "The doctrine of qualified immunity protects government: officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson* v. *Callahan,* 129 S. Ct. 808, 815 (2009) (citation and internal quotations omitted). In *Saucier* v. Katz 533 U.S. 194 (2001), the Supreme Court set out a two-prong test, for resolving government officials' qualified immunity claims. It is within the court's discretion to determine which of the two prongs of the qualified immunity analysis should be addressed first, in light of the circumstances of the particular case at hand. *Pearson,* 129 S. Ct. at 818. In the first prong, the court must decide whether the facts that a plaintiff alleges make out a violation of a constitutional right. *Pearson,* 129 U.S. S. Ct. at 8) 5-16. In the second prong, the court must decide whether the right at issue was "clearly established" at the time of defendant's alleged misconduct. *Id.* at 816. "'Qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right." *Id.* at 816. (citation omitted). The "clearly established" inquiry "turns on the

objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." *Id.* at 822. (citation and internal quotation marks omitted). "[Qualified immunity operates *to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.'" *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Saucier*. 533 U.S. at 206).

Mentzer and Ditzler were not on notice that accessing personnel files in their possession was unlawful. At the time the files were accessed and used in deposition, there was no clearly established rule against Defendants' actions. Plaintiffs also cannot show they had a constitutional property interest *in* their employee personnel files. Defendants' conduct in accessing files in their possession was not in violation of any clearly established statutory or constitutional rights of which a reasonable person would have known. Mentzer and Ditzler are therefore entitled, to qualified immunity.

Further, Plaintiffs fail to establish a claim against Elizabethtown Borough. A local government cannot be vicariously liable for "injuries inflicted solely by its employees or agents." *Monell v. Dep't of Soc. Service of N.Y.*, 436 U.S. 658, 694 (1978). Government entities may, however, be liable under § 1983 when execution of a policy or custom, carried out by an employee acting under color of law, causes the deprivation of an individual's civil rights. *Id.* Simply put "a municipality can be found liable under section 1983 only where the municipality itself *causes* the constitutional violation at issue." *Canton*

v. Harris, 489 U.S. 378, 385 (1989) (citing *Monell* 435 U.S. 658) (emphasis in original). Plaintiffs do not cite any policy or custom which resulted in a deprivation of their civil rights. Any claims against Elizabethtown Borough must therefore also be dismissed because it cannot be held liable under Monell.

This Court will not impose sanctions in this matter. Federal Rule of Civil Procedure 11 authorizes the Court to impose "sanctions upon the signer of any pleading, motion or other paper that was presented for an improper purpose, e.g. 'To harass or to cause unnecessary delay or needless increase in the cost of litigation.'" *Martin v. Brown,* 63 F.3d 1252, 1264 (3d Cir. 1995) (quoting Landon *v. Hunt,* 938 F.2d 450,452 (3d Cir. 1991)). This Court does not find this action was brought for an improper purpose.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

STEVEN L. ROBERTS et al.	CIVIL ACTION
V.	
JACK F. MENTZER et al.	NO. 08-4507

ORDER

AND NOW, this 2nd day of July, 2009, Defendants' Motion to Dismiss Plaintiffs' Amended Complaint (Document 11) is GRANTED. Judgment is ENTERED in favor of Defendants Jack R. Mentzer Joseph M. Ditzler, and Elizabethtown Borough, and against Plaintiffs Steven L. Roberts, Shane Deardorff Matthew T. Shuey, Michael S. Lyons, Clair Martin, Timothy W. Wheale, and Gordon J. Berlin.

Defendants' Motion for Sanctions against Plaintiff Michael S. Lyons (Document 9) is DENIED.

Defendants' Motion for Leave to File a Reply Brief (Document 17) is GRANTED.

Plaintiffs' Motions for Extensions of Time (Documents 13 and 15) are GRANTED:

The Clerk of Court shall mark the above-captioned case CLOSED.

BY THE COURT:

Juan R. Sanchez.

12

(2)

No. 10-306

Supreme Court, U.S.
FILED
OCT 1 - 2010
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

Steven Roberts, Shane Deardorff, Matthew T. Shuey, Michael Lyons, Clair Martin, Timothy M. Wheale and Gordon J. Berlin,
Petitioners

v.

Jack F. Mentzer, Joseph M. Ditzler and Elizabethtown Borough,
Respondents

On Petition for a Writ of Certiorari to the Unted States Court of Appeals for the Third Circuit of Pennsylvania
Case No.: 09-3251

BRIEF IN OPPOSITION

Frank J. Lavery, Jr.
Lavery, Faherty, Young & Patterson, P.C.
225 Market Street
Suite 304
Harrisburg, PA 17101
(717) 233-6633

Michael M. Miller
Eckert Seamans Cherrin & Mellot
213 Market Street; 8th
Harrisburg, PA 17101
(717) 237-7174

Attorneys for Respondents

Questions presented

1. WHETHER THE COURTS BELOW PROPERLY CONCLUDED THAT PETITIONERS DID NOT HAVE A PROTECTED PRIVACY INTEREST AND/OR PROPERTY RIGHTS IN BOROUGH OWNED AND MAINTAINED PERSONNEL RECORDS AND FILES USED DURING THE PRIVATE DISCOVERY DEPOSITIONS IN THE PREDECESSOR LITIGATION?

2. WHETHER THE COURTS BELOW PROPERLY CONCLUDED THAT THE CLAIMS AGAINST RESPONDENTS MENTZER AND DITZLER WERE BARRED BY QUALIFIED IMMUNITY IN THAT THEIR ACTIONS IN UTILIZING BOROUGH OWNED AND MAINTAINED PERSONNEL RECORDS AND FILES IN THE DEFENSE OF THE PREDECESSOR LITIGATION DID NOT VIOLATE CLEARLY ESTABLISHED RIGHTS OF WHICH A REASONABLE OFFICIAL WOULD HAVE KNOWN?

Rule 29.6 Disclosure Statement

This Brief in Opposition is not subject to any provisions of Supreme Court Rule 29.6 as Respondents are a local governmental agency and employees thereof.

TABLE OF CONTENTS

Questions Presented i

Rule 29.6 Disclosure Statement ii

Table of Contents iii

Table of Authorities v

Counterstatement of the Case 1

Reasons for Denying the Petition 12

I. There are no protected privacy interests and/or property rights implicated in the use of Borough owned and maintained personnel records and files during the private discovery depositions in the predecessor litigation 12

II. The courts below properly concluded that the claims against Respondents Mentzer and Ditzler were barred by qualified immunity in that their actions in utilizing Borough owned and maintained personnel records and files in the defense of the predecessor litigation did not violate clearly established rights of which a reasonable official would have known 31

TABLE OF CONTENTS (continued)

III. Petitioners remaining contentions are meritless 40

Conclusion 46

TABLE OF AUTHORITIES

Cases	Page
Anderson v. Creighton, 483 U.S. 635 (1987)	37
Coughlin v. Lee, 946 F.2d 1152 (5th Cir. 1991)	13
County of Sacramento v. Lewis, 523 U.S. 833 (1998)	29
Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, 812 F.2d 105 (3rd Cir. 1987)	42, 43
Grant v. City of Pittsburgh, 98 F.3d 116 (3d Cir. 1996)	35
Groh v. Ramirez, 540 U.S. 551 (2004)	38
Harlow v. Fitzgerald, 457 U.S. 800 (1982)	35
Hope v. Pelzer, 536 U.S. 730 (2002)	35
Horizon of Hope; Ministry v. Clark County, Ohio, 115 F.R.D. 1 (S.D. Ohio 1986)	13

TABLE OF AUTHORITIES (continued)

Cases — Page

Hunter v. Securities Exchange Committee, 879 F. Supp. 494 (E.D. Pa. 1995) 41

Jones v. City of Wilmington, 299 F. Supp. 2d 380 (D. Del. 2004) 14

McLaughlin v. Wilson, 271 F.3d 566 (3d Cir. 2001),*cert. denied*, 535 U.S. 989, 122 S. Ct. 1543, 152 L. Ed. 2d 469 (2002) 35-36

National Archive & Record's Administration v. Favish, 541 U.S. 157 (2004) 44

O'Connor v Ortega, 480 US 709 (1987) 15, 17

Pearson v. Callahan, _____ U.S. _____, 129 S. Ct. 808 (2009) 37

Riccardi v. Grant, 532 U.S. 919 (2001) 35

Simmons v. Beard, 581 F.3d 158 (3d Cir. 2009) 31

United States v. Pelullo, 399 F.3d 197 (3d Cir. 2005) 31

TABLE OF AUTHORITIES (continued)

Cases — Page

Watts v. Kimmerly, 1996 WL 911254 (W.D. Mich. Apr. 12, 1996) 14

Weahkee v. Norton, 621 F.2d 1080 (10th Cir. 1980) 14

Whalen v. Roe, 429 U.S. 589 (1977) 41

Wilkie v. Robbins, 551 U.S. 537 (2007) 35

Federal Rules

Fed. R. Evid. 501 13

COUNTERSTATEMENT OF THE CASE

Petitioners, Michael S. Lyons, Stephen [misnamed Steven] L. Roberts, Shane Deardorff, Matthew T. Shuey, Clair Martin, Timothy W. Wheale and Gordon J. Berlin initiated a civil action by filing Complaint on September 16, 2008. (JA p. 5, Doc. 1) Named as Defendants in the Complaint were Jack F. Mentzer, Joseph M. Ditzler and Elizabethtown Borough. (*Id.*) Michael S. Lyons was also a Plaintiff in a previously filed civil action involving the identical Defendants and docketed in the United States District Court for the Eastern District of Pennsylvania at docket number 5:08-CV-00094 ("Lyons I"). The remainder of the Petitioners in the case at bar are all current or former police officers employed by

the Borough of Elizabethtown who were deposed during the discovery phase of Lyons I. (JA p. 21; Am. Comp. ¶14) The parties to, theories alleged and facts set forth in Lyons I are intertwined with the subject matter of the instant action.

In Lyons I, the predecessor civil action, Petitioner, Michael S. Lyons, Sr. claimed that his First and Fourteenth Amendment rights were violated and that he had been retaliated against by Respondents Mentzer, Ditzler and the Borough for speaking out on matters of alleged public concern. (JA pp. 33-35; Lyons I Comp. ¶¶1, 7-9) In that civil action Lyons also alleged that he "suffered retaliation in the form of disparate treatment such as improperly applied and excessively severe and unique punishment

different from how other officers similarly situated were treated." (JA p. 35; Lyons I Comp. ¶9) He further claimed that he was ostracized, given less desirable duty assignments, harassed, and had his professional standing called into question with surrounding police departments. (*Id.*) Central to his proofs in Lyons I, Petitioner Lyons had to establish that he was subjected to more stringent and/or severe terms and conditions of employment than other similarly situated employees of the Elizabethtown Police Department.

During Lyons I, Lyons served Initial Disclosures pursuant to Rule 26 (a), Federal Rules of Civil Procedure in which he identified himself, Shane Deardorff, Cpl. Gordon Berlin,

Clair R. Martin, and Matthew Shuey as "witnesses that have knowledge of the claim that is the basis of this lawsuit." (SA pp. 3-4) At that time, Petitioner Lyons indicated that "additional witnesses will be identified as the litigation proceeds and witnesses become available." (SA p.4) Petitioners Roberts and Wheale were also identified as fact witnesses during discovery in Lyons I.

During discovery in Lyons I, Petitioner Lyons propounded a Request for Production of Documents seeking production of his complete personnel file, the complete personnel file of Officer Finicle (a defense fact witness), any and all documents identified in Respondents' Initial Disclosures, and various other documents in an

attempt to substantiate the conclusory averments of disparate treatment set forth in the Complaint. (SA pp. 7-8) At no time during the discovery phase of Lyons I did Attorney Bailey and/or Petitioners complain of any alleged misconduct with respect to the manner in which the depositions were conducted. In fact, the dockets for Lyons I (JA pp. 27-32) confirm that there were no discovery motions filed nor any discovery conferences requested to address Petitioners' claims of misuses and/or abuses of their Borough owned and maintained personnel files and records in the predecessor civil action.

Following the dismissal of Lyons I via a defense Summary Judgment Motion, Petitioners initiated the instant civil action. In an Amended

Complaint, Petitioners acknowledged that they were all identified as potential fact witnesses in the Lyons I Initial Disclosures and were deposed by defense counsel during the discovery phase of the predecessor civil action. (JA p. 21; Am. Comp. ¶¶11-13) Petitioners further averred that Chief Mentzer, on behalf of the Borough, maintained personnel files on each of the officers employed by the Elizabethtown Borough Police Department and that Respondents Mentzer and Ditzler, along with the Borough Manager and defense counsel accessed those files and communicated amongst themselves and with defense counsel regarding deposition preparations in Lyons I. (JA p. 22; Am. Comp. ¶¶15-17) The Complaint also asserted that all of the Petitioners were deposed

in Lyons I and that Petitioners' counsel utilized information from their personnel files while cross examining them at their depositions. (JA pp. 22-23; Am. Comp. ¶¶18-19)

By Memorandum and Order dated July 2, 2009, District Court Judge Sanchez granted Respondents' Motion to Dismiss the Amended Complaint, but denied Respondents' Motion for Rule 11 Sanctions. (Appendix B, 16a-26a) In dismissing Petitioners' First Amendment claims, the District Court ruled that Petitioners failed "to show a separate retaliation or were prevented from freely appearing as witnesses, associating with persons of their choosing or accessing and using the Courts." (*Id.*, 19a-20a) Judge Sanchez further found that since Petitioners had no

reasonable expectation of privacy in their personnel files which were owned and maintained by the Respondents, their Fourth Amendment rights were not implicated. (*Id.*, 20a-23a) The District Court also ruled that the Fourteenth Amendment due process claims failed because there was "no authority to support Plaintiffs' contention they had a property interest in their personnel files" which were used in discovery depositions in the predecessor civil action. (*Id.*, 22a-23a)

In the alternative, Judge Sanchez concluded that the Amended Complaint against Respondents Ditzler and Mentzer was subject to dismissal on qualified immunity grounds in that they "were not on notice that accessing personnel

files in their possession was unlawful" and because "there was no clearly established rule against Defendants' actions." (*Id.*, 23a-24a) The District Court did not reach the absolute immunity/judicial privilege defense asserted by Respondents. Finally, Judge Sanchez ruled that the Amended Complaint failed to state any cognizable §1983 municipal liability claims against Elizabethtown Borough. (JA pp. 15-16)

Petitioners filed a timely Notice of Appeal. On May 27, 2010 a panel of the United States Court of Appeals for the Third Circuit issued a non-precedential opinion and order affirming the dismissal of Petitioners' Amended Complaint. (Appendix A, 1a-15a) The Appellate Court found that the Amended Complaint did not assert any

cognizable claims for violation of the Petitioners' First Amendment claims (right to access, right to petition, right of association and/or retaliation). (*Id.*, 4a-11a) In affirming the dismissal of the Fourth Amendment claims, the panel found that Petitioners did not have a privacy interest and/or reasonable expectation of privacy in the personnel files maintained by their employers. (*Id.*, 11a-12a) The panel further concluded that there were no cognizable substantive due process claims arising out of the use of the personnel files during the depositions conducted in Lyons I. (*Id.*, 12a-13a) In the alternative, the Third Circuit found that the claims against Respondents Mentzer and Ditzler were barred by qualified immunity (*Id.*, 13a-15a) and there was no cognizable municipal

liability claim against the Borough. (*Id.*, 15a) Petitioners did not seek re-hearing by the merits panel and/or the Third Circuit en banc.

On September 1, 2010, Petitioners' Petition for a Writ of Certiorari was docketed by this Honorable Court. Two questions were presented for review in that Petition. The reference to the rights of private employees in question #1 (Petition, p.1) is misplaced in that all of the Petitioners are current or former municipal police officers and there were no claims presented to the courts below in the context of employment in the private sector. Respondents now file this Brief in Opposition to the Petition for a Writ of Certiorari.

REASONS FOR DENYING PETITION

I. There are no protected privacy interests and/or property rights implicated in the use of Borough owned and maintained personnel records and files during the private discovery depositions in the predecessor litigation.

On appeal, Petitioners have seemingly chosen to largely abandon their First Amendment claims to focus their argument on whether or not Petitioners possessed a privacy interest and/or property right in the contents of Borough-owned and Borough generated personnel files. Other than their broad appeal to natural law concepts, Petitioners have failed to demonstrate that any such privacy interest and/or property right exists either as a matter of law or as a creature of statute. To the contrary, the courts below were

correct when they concluded that the use of Borough-owned and Borough generated personnel files during the private discovery depositions in Lyons I did not violate Petitioners Fourth and/or Fourteenth Amendment rights.

In a federal civil rights action, federal law--not state law--controls what evidence is privileged and discoverable. Fed. R. Evid. 501; Horizon of Hope; Ministry v. Clark County, Ohio, 115 F.R.D. 1, 4 (S.D. Ohio 1986). Under federal law there exists no general privilege for personnel files, even those of law enforcement officers. Horizon of Hope, 115 F.R.D. at 6 (police officer personnel files discoverable); Coughlin v. Lee, 946 F.2d 1152, 1159 (5th Cir. 1991) (allowing discovery of records of police officer background check);

Weahkee v. Norton, 621 F.2d 1080, 1082 (10th Cir. 1980) (allowing discovery of EEOC personnel files). In fact, it is common practice for personnel files to become part of the record in matters involving litigation. Jones v. City of Wilmington, 299 F. Supp. 2d 380, 394 (D. Del. 2004) (finding no privilege under federal law for personnel files and ordering production of relevant files); Watts v. Kimmerly, 1996 WL 911254 (W.D. Mich. Apr. 12, 1996) (affirming magistrate's order that granted Petitioners' motion to compel discovery of personnel files of police officers who were not named Respondents in Title VII action).

Since there is no general federal statutory privilege protecting personnel files, then Petitioners must identify a right to privacy

arising from the Fourth Amendment. As the District Court rightly observed, the United States Supreme Court has concluded that the capacity of a government employee to claim the protection of the Fourth Amendment depends on whether the area or item searched was one in which the employee had reasonable expectation of privacy. O'Connor v Ortega, 480 US 709 (1987).

The determination of the following facts by the District Court are critical to addressing the Petitioners' flawed claim that any privacy right exists under O'Connor, *supra*:

> The Petitioners were all current or former police officers employed by Elizabethtown Borough. (Appendix B, 17a)
>
> In his pretrial disclosures in Lyons I No. 08-94 individual Petitioner

> Michael S. Lyons identified all of the Petitioners as individuals possessing discoverable information regarding the claims set forth in Lyons I. (*Id.*)
>
> During depositions in Lyons I, the Borough of Elizabethtown, its Police Chief and Lieutenant (collectively "the Borough Respondents") used Borough-owned and Borough generated personnel files to cross-examine Petitioners. (*Id.*, 18a)
>
> The Borough Respondents owned and maintained the [Petitioners'] personnel files and had free access to those files. (*Id.*, 22a)
>
> The Petitioners themselves admitted in their Amended Complaint that the Borough Respondents "were responsible for maintaining the personnel files for all Elizabethtown police officers in the ordinary course of business." (*Amended Complaint* at ¶¶ 15 and 16)

The Fourth Amendment provides that persons shall have the right to be secure in their

persons, houses, papers and effects against unreasonable searches and seizures by the government. O'Connor, *supra*. The necessary predicate to finding a violation of the Fourth Amendment is the requirement that someone other than the governmental employer own the "papers and effects" which they claim were improperly searched.

There was no evidence below that the Petitioners maintained control over or owned the Borough's personnel records. To the contrary, the Petitioners' Amended Complaint admitted that it was the Borough and its employees who "were responsible for maintaining the personnel files for all Elizabethtown police officers in the ordinary

course of business." (*Amended Complaint* at ¶¶15 and 16)

The District Court correctly concluded that no reasonable expectation of privacy existed since each officer's personnel file had always been in the possession of the Borough Respondents/employer, not the Petitioners who were the employees. (Appendix A, 22a) Under the facts as plead, the District Court could come to no contrary conclusion.

Put another way, it is entirely inconsistent to admit that the Borough Respondents possessed the right to maintain and use Borough owned employment and personnel records on a day to day basis but—following the institution of a lawsuit—be prevented from using that same

information already in its possession to defend itself in an employment lawsuit.

Additionally, there can be no invasion of any individual's Fourth Amendment right to privacy where the alleged private material disclosed was already known to the recipient. Far from "revealing" the contents of any individual Respondent's personnel file, Petitioners were asked questions during their depositions regarding information in their personnel files about which they *should already have been well aware*.

Further, the District Court properly concluded that there was no invasion of any individual's Fourth Amendment right to privacy where the deposition itself was a private event

attended by the same people charged with maintaining the personnel files in the first place. (Appendix B, 22a; *Amended Complaint* at ¶¶15 and 16) Under these circumstances, the use of the files during a private deposition could hardly be deemed a "disclosure" of information not previously known since the people also in the room created the information in the personnel file or they were the custodians of the file.

As to Petitioners'[1] claims that they possessed some due process rights arising under

---

[1] There is no regulation, no policy and no rule that would establish any such due process right. In fact, no court has ever embraced a rule imposing due process requirements on an employer's review of personnel files owned and maintained by the employer because any such rule would be a significant restriction on the ability of employers to manage its workforce. If an employee had

the Fourteenth Amendment, the District Court correct concluded that:

> There is no authority to support Petitioners' contention that they had a property interest in their personnel files. Further nothing supports Petitioners' position [*sic*] a property interest, if any, was deprived when Respondents used, for purposes of discovery, files which Petitioners themselves had placed at issue.

Obviously, since the files were not the Petitioners' property, then no process could be due because there could be no denial of a property interest. There is simply no basis to contend, as Petitioners do, that any right under the Fourth or Fourteenth

---

> the right to demand due process before an employer accessed, reviewed or used the employment files and records that the employer owned and maintained, effective personnel management would be impossible.

Amendments was violated by the Borough Respondents' acts.

On appeal to the Third Circuit, Petitioners argued (Appellants' Brief at p. 13) that they have a "confidential, protected privacy right" in their personnel records and files and that this right is "so well known that judicial notice could be taken of this state of affairs." Petitioners' argument on this point was apparently so fundamental that Petitioners deem it unnecessary to encumber it with any citation to legal precedent at all. *Id.*

Further, Petitioners have attempted to mislead this Court and obscure this issue. Petitioners incorrectly aver that these records were used by individuals who were being sued in their individual capacities. (Petition, p. 5)

Petitioners appeal to claim that Chief Mentzer and Lt. Ditzler took the Borough's personnel files for their own use without notice or warning to the Petitioners. (*Id.*) Petitioners plainly wish to pretend that Chief Mentzer and Lt. Ditzler absconded with Borough records to which—in the Petitioners' view—they had no right of access.

Petitioners' attempt to rewrite history is unavailing here for several reasons. First, in the precise words of the Petitioners' own Amended Complaint both Chief Mentzer and Lt. Ditzler were responsible on a day to day basis for maintaining the personnel records at issue here:

> Mentzer maintains the personnel files for the Borough of all the Petitioners in his office. . . (*Amended Complaint* at ¶ 15)
>
> Upon information and belief Ditzler has, and had, access to these files also, as does and did, the Borough . . . (*Amended Complaint* at ¶ 16)

Second, it was clearly the Petitioners' own decision to sue the Borough *as well as* Chief Mentzer and Lt. Ditzler both in their individual and official capacities. One can only conclude that, for the sole purpose of making the recitation of their argument more dramatic, Petitioners simply ignore the facts presented below.

Similarly, Petitioners claim that "if the police officers had an opportunity to be made aware of what they were going to confront at their depositions, as possible fact witnesses, they could

have pursued their files and may have seen fit to object." *Petitioners' Brief* at p. 14. This argument founders when one considers that Michael Lyons identified Petitioners Deardorff, Martin, Shuey (and Gordon Berlin who is not a Petitioner instantly) in his Rule 26(a) Initial Disclosures as persons who might have possessed discoverable information regarding his allegations of "disparate treatment." (SA pp 3-4; Lyons' Rule 26(a) Disclosures) Petitioners Roberts and Wheale were also identified as fact witnesses during discovery in Lyons I. Further, Lyons requested "copies of all memoranda, summaries of writings, documents, diagrams, pictures, emails, complaints, logs, journals, discipline actions etc.

in your possession." (SA pp 7-8; Lyons' Request for Production of Documents)

It *is* a fact that the Borough Respondents deposed the Petitioners, each one of whom Petitioner Lyons identified as possessing discoverable information. And, because the centerpiece of Lyons' claim was that he was treated differently than other officers in matters of, *inter alia*, discipline[2], it is equally unsurprising that the questions asked during

---

[2] In Lyons I, Michael S. Lyons filed a civil rights action in which he claimed that he "suffered retaliation in the form of disparate treatment such as improperly applied excessively severe and unique punishment *different from how other officers similarly situated were treated*, ostracism, *less* desirable duty assignments, consistent harassment, and the intentional denigration of his professional standing . . ." (JA p. 35; *Complaint* in Lyons I at ¶ 9 (Emphasis added)).

these depositions focused on the Petitioners' comparative individual service records which Lyons placed at issue based on the allegations of his Complaint.

Accordingly, the fact that the Petitioners were all specifically deposed as fact witness and that they were going to be asked questions about, *inter alia*, their employment since Mr. Lyons had claimed that he had been treated less favorably than other employees should have been no surprise to anyone involved. That was, obviously, the whole point in deposing the Petitioners.

Further, as the District Court properly noted, none of the Petitioners complained of misconduct during the pendency of Lyons I. (Appendix B, 21a n.9) However, on appeal,

Petitioners claim that their counsel in the instant litigation (who was also counsel for Petitioner Lyons in Lyons I) "objected strenuously" to the use of personnel records in depositions. (Petition, p. 4)

The deposition of Petitioner Clair Martin took place on May 29, 2008 and the final deposition (of Petitioner Tim Wheale) took place on July 1, 2008. Curiously, at no time during that ten-week interval did Lyons' counsel (the same counsel in the instant litigation) or any other Petitioner seek the intercession of the District Court though plainly they could have done so under Fed. R. Civ. P. 30(d)(3)(A). (Appendix B, 21a and n. 9)

It is improper to seek to institute a separate lawsuit to make a *post hoc* objection to alleged conduct in a previously closed case. Petitioners here had only to file an objection to the use of the documents under Fed. R. Civ. P. 30(d)(3)(A) in order to secure a remedy to the conduct about which they complain in this action. Petitioners' failure to do so is fatal to their claim.

On appeal, the Third Circuit affirmed the dismissal of Petitioners' substantive due process claims. In doing so, the panel applied the "shocks the conscience" standard to the Respondents' conduct. County of Sacramento v. Lewis, 523 U.S. 833, 845 (1998). In Lewis, this Honorable Court explained that "the core of the concept" of due process is "protection against arbitrary

action," and that "only the most egregious official conduct can be said to be arbitrary in the constitutional sense." *Id.* at 845-846. In their Petition, Petitioners seem to assert that the Third Circuit applied the appropriate legal standard to the particular facts of this case. While Petitioners may disagree with the panel's decision under the circumstances, such a disagreement does not constitute a compelling reason warranting discretionary review by this Honorable Court.

II. The courts below properly concluded that the claims against Respondents Mentzer and Ditzler were barred by qualified immunity in that their actions in utilizing Borough owned and maintained personnel records and files in the defense of the predecessor litigation did not violate clearly established rights of which a reasonable official would have known.

As a threshold matter, Respondents contend that Petitioners have waived any issues with respect to the District Court's ruling that qualified immunity barred the claims against Respondents Mentzer and Ditzler. *See*, Simmons v. Beard, 581 F.3d 158 (3d Cir. 2009); United States v. Pelullo, 399 F.3d 197, 222 (3d Cir. 2005)(citing "the well established rule that the failure to identify or argue an issue in an opening brief constitutes waiver of that issue on appeal").

In their Appellate Brief, Petitioners did not identify or argue any issue with respect to the District Court's ruling on the qualified immunity issue. In fact, the words "qualified immunity" did not even appear in Petitioners' Third Circuit Brief. Pursuant to the holdings in Simmons and Pelullo, *supra.*, Appellants have waived any issue on appeal with respect to application of the qualified immunity defense. Even if Petitioners' Third Circuit Brief could be construed as addressing the clearly established law prong of the analysis, their Brief was completely devoid of any argument on whether a reasonable police administrator in Respondents' shoes would know that their actions constituted a violation of Petitioners' federally protected rights.

Consequently, the District Court's ruling in favor of Respondents Mentzer and Ditzler on qualified immunity grounds was properly affirmed as a matter of law.

In their Petition, Petitioners identify two questions presented for review. Neither of those questions addresses the application of the qualified immunity defense by the Courts below. (Petition p. 1) Moreover, no where in their Petition do Petitioners aver that the District Court and/or Third Circuit panel applied the wrong legal standard with respect to the qualified immunity defense or misapplied the correct qualified immunity standard to the allegations of the Amended Complaint in dismissing their claims. As such, Petitioners have not properly

preserved any issue for review by this Honorable Court with respect to the dismissal of the claims against Respondents Mentzer and Ditzler on qualified immunity grounds.

Even if the issue of qualified immunity is properly before this Honorable Court, which is denied, there was no error by the courts below in the application of that defense to the facts as alleged in the Amended Complaint. In their dispositive motion and supporting brief, Respondents Mentzer and Ditzler sought the dismissal of the claims asserted against them under the doctrine of qualified immunity. It is well settled that qualified immunity shields public officials from liability if their conduct does not violate a clearly established constitutional

right. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Wilkie v. Robbins, 551 U.S. 537 (2007). "Qualified immunity operates 'to ensure that before they are subjected to suit, officers are on notice that their conduct is unlawful.'" Hope v. Pelzer, 536 U.S. 730, 739 (2002)(citation omitted). Qualified immunity is a question of law for the court to decide early in the litigation process. Grant v. City of Pittsburgh, 98 F.3d 116, 122 (3d Cir. 1996), *cert. denied*, Ricciardi v. Grant, 532 U.S. 919 (2001).

In order to be "clearly established a Plaintiff must show that "in light of preexisting law, the conduct at issue has, in a more particularized sense, been determined to be unlawful." McLaughlin v. Wilson, 271 F.3d 566,

571 (3d Cir. 2001), *cert. denied*, 535 U.S. 989, 122 S. Ct. 1543, 152 L. Ed. 2d 469 (2002). Significantly, the burden of identifying a clearly established right is not fulfilled by simply citing a constitutional provision. Petitioners have failed woefully in establishing violations of any constitutional right by Respondents Mentzer and Ditzler. As fully explained above, there is no law to support the Petitioners' claimed application of the cited constitutional rights, much less the required, preexisting law that clearly establishes the same. As such, the District Court properly concluded that the Amended Complaint against the individual Respondents was subject to dismissal on qualified immunity grounds.

Nor could reasonable persons in the position of Respondents Mentzer and Ditzler have known that their actions would deprive Petitioners of any such rights. This second prong of the qualified immunity test recognizes that public officials are not constitutional scholars and is designed to insure that "the contours of the right must be sufficiently clear that a reasonable official would understand what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 639 (1987); Pearson v. Callahan, ____ U.S. ____, 129 S. Ct. 808, 815 (2009). As this Honorable Court has explained, this is a high hurdle for Plaintiffs to overcome because qualified immunity provides "ample protection to all but the plainly incompetent, or those who knowingly

violate the law." Groh v. Ramirez, 540 U.S. 551, 571 (2004).

In the case *sub judice*, no reasonable public official, including Respondents Mentzer and Ditzler, could have known that the actions at issue would somehow violate the claimed constitutional rights of the Petitioners to privacy and freedom in their associations, privacy in their persons or protection of their property. Respondents' alleged conduct involved their use of Borough owned personnel and business records, over which they exercised appropriate responsibility, to prepare and implement a defense to litigation initiated by one of the Petitioners, and conduct discovery of Petitioner Lyons' claims by deposing witnesses and

reviewing the documents identified by Lyons himself. This is the essential conduct of any defendant in any such civil action. Respondents Mentzer and Ditzler discussed the contents of the personnel records only with defense counsel, and utilized the information only in the confines of the pending judicial proceeding. There was no, nor do Petitioners allege, an abusive use or dissemination of the information outside of the judicial proceeding.

Thus, as Petitioners' claimed rights are not clearly established and a reasonable person would not have known that the conduct at issue would be violative thereof, qualified immunity attaches and provides an alternative grounds for affirming the District Court's ruling dismissing the

Amended Complaint as to Respondents Mentzer and Ditzler.

III. Petitioners remaining contentions are meritless.

On page 7 of their Petition, Petitioners contend in conclusory fashion that the courts below ignored and/or expressly departed from holdings of this Court and from the Third Circuit. Such an assertion is fatuous in that none of the authorities cited by Petitioners at all address the issue presented herein, *to-wit*, whether or not they had any privacy rights and/or property interests in Borough owned or Borough maintained personnel records sufficient to invoke the protections of the Fourth or Fourteenth Amendments to the United States Constitution.

By way of example, Hunter v. Securities Exchange Committee, 879 F.Supp. 494 (E.D. Pa. 1995) involved the disclosure of subpoenaed financial records by a federal investigator to a private third party. Hunter does not address a government employer's use of its own personnel records in its own defense of an employment lawsuit.

Similarly, Whalen v. Roe, 429 U.S. 589 (1977) involved a question of whether or not New York's enactment of law requiring that prescriptions for the most dangerous legitimate drugs be prepared on official forms with one copy being sent to the state was a reasonable exercise of New York's police powers. Again, Whalen v. Roe, did not address a government employer's use

of its own personnel records in its own the defense of an employment lawsuit.

In Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, 812 F.2d 105 (3rd Cir. 1987), the Fraternal Order of Police (FOP) brought a constitutional challenges to a questionnaire promulgated by the Philadelphia Police Department for use in selecting applicants to its Special Investigations Unit (SIU). This Court partially affirmed the district court's grant of an injunction which concluded that portions of the questionnaire seeking information concerning applicants' medical history, gambling habits and alcohol consumption, and seeking information about applicants' and their families' financial status, organizational memberships, and arrest

records violated police officers' federal constitutional rights of privacy and association.

Although this case did not address a government employer's use of its own personnel records in the defense of an employment lawsuit nor did it specifically address issues arising under the Fourth or Fourteenth amendment, it is notable that in Fraternal Order of Police, Lodge No. 5, the Third Circuit affirmed that governmental employers have a greater interest in personnel records even those involving medical and financial information and that employees have "little reasonable expectation that such medical information will not be requested." Thus, no constitutional violation was found by virtue of the City's decision to seek that information.

Finally, National Archive & Record's Administration v. Favish, 541 U.S. 157 (2004) involved a Freedom of Information Act (FOIA) action, which sought to compel production of death-scene photographs of the body of Vincent Foster, former President Clinton's deputy counsel who died of apparent suicide. The fact that this Honorable Court interpreted the FIOA's personal privacy exception to exclude from production certain death-scene photographs hardly provides a basis for this Court to find that the Borough violated Petitioners' Fourth and Fourteenth Amendment rights.

Petitioners have not and cannot identify any compelling reasons warranting discretionary review of the rulings of the courts below.

Petitioners have not identified any relevant decisions issued by this honorable Court which are in conflict with the rulings of the courts below. Petitioners identify no Circuit split or legal holding by any other Circuit Court of Appeals which have recognized protected privacy and/or property rights under analogous circumstances. Consequently, this Petition must be denied.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that the Court deny the Petition.

Respectfully Submitted,

Frank J. Lavery, Jr.
Lavery, Faherty,
Young & Patterson, P.C.
225 Market Street
Suite 304
Harrisburg, PA 17101
(717) 233-6633

Michael M. Miller
Eckert Seamans
Cherrin & Mellot
213 Market Street; 8th
Harrisburg, PA 17101
(717) 237-7174

Attorneys for Respondents

October 1, 2010